

NOTICE OF PETITION

**IN THE
Supreme Court of the United States**

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.

MARIE E. FOLE, Respondent.

**PETITION FOR WRIT OF HABEAS CORPUS, NOTICE OF PRESEN-
TATION, AND BRIEF IN SUPPORT OF PETITION.**

GEORGE GOWEN FERRY,

Counsel for Petitioner,
**415 BRIDGE STREET,
PHILADELPHIA, PA.**

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No.

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

MARCH 17, 1920.

SIRS:—Please take notice that upon the annexed petition of Philadelphia and Reading Railway Company, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith, and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States, at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fifth day of April, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of said Court, rendered in the above cause on the second day of February, 1920, which affirmed the decree or judgment of the Court of Common Pleas No. 5

of Philadelphia County, Pennsylvania, entered in said Court on the fourteenth day of August, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, in favor of Marie E. Polk, the respondent, for the sum of \$5,595.98.

Dated at Philadelphia, March 20th, 1920.

GEORGE GOWEN PARRY,

Counsel for Petitioner.

415 Reading Terminal, Philadelphia, Pa.

*To M. D. Hayes, Esq., F. H. McAdams, Esq., Counsel
for Respondent, Penn Square Building, Philadelphia,
Pa.*

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Philadelphia and Reading Railway Company, in support of this, its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, the highest Court in the State in which a decision could be had to review a final decree or judgment rendered on the second day of February, 1920, which affirmed the decree of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, entered on the fourteenth day of August, 1919, upon an award of the Compensation Referee, adopted and affirmed by the Workmen's Compensation Board of the State of Pennsylvania, in favor of Marie E. Polk for the sum of \$5,595.98, respectfully shows:—

1. That this action was begun by petition under the Workmen's Compensation Act of the State of Pennsylvania, filed by Marie E. Polk, dependent widow of John

M. Polk, claiming an award of compensation for the accidental death of her husband, which occurred while in the course of his employment as a freight brakeman of the Philadelphia and Reading Railway Company.

2. That your petitioner duly filed its answer to the said petition, denying liability under the Workmen's Compensation Act of Pennsylvania for the said accident, on the ground that the said Polk was engaged with the defendant in interstate commerce at the time he was injured.

3. That the record, a certified copy of which is presented herewith, shows that there is no conflict of evidence, the claimant relying solely upon the ground that the defendant did not call witnesses to prove a fact which had already been stipulated upon the record by agreement between the parties.

4. That the record shows that Polk, who was a brakeman in the freight service of the defendant railway company, was crushed between two cars in a freight train which was being handled by the defendant's engine, No. 832. Polk was a member of the crew of this engine and was at work in the course of his employment on this train when he was hurt. The train contained a number of cars, some of which were moving and en route from points outside the State of Pennsylvania to points within and without the State, and others which had originated in the State and were bound to points outside of it. The engine and crew were concerned merely with moving the train through the defendant's Port Richmond Yard in Philadelphia, Pennsylvania, and their usual duties did not take them beyond the yard limits.

5. The Compensation Referee, although incorporating in his findings of fact the agreement of the parties that "Polk was employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Philada.,

Penna., handled by engine No. 832, was caught between two cars and as the result thereof sustained certain injuries," and finding further that this train contained a number of interstate cars, made an award of compensation to the claimant on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" and therefore the defendant had not met the burden of proof that "Polk was actually engaged in duties incident to interstate commerce."

6. The Workmen's Compensation Board of the State of Pennsylvania adopted the Referee's findings of fact and conclusions of law and affirmed the award. The Court of Common Pleas, upon appeal, directed judgment to be entered in accordance with the award of the Referee and the Workmen's Compensation Board and dismissed the appeal. This judgment was affirmed by the Supreme Court of Pennsylvania on the ground that "the Referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was 'the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured.'" A petition for reargument was denied.

7. That in addition to the question that the finding of the Referee conclusively establishes the fact that Polk was actually engaged in the course of his employment as a brakeman on an interstate train when he was injured, the question is raised that the judgment affirmed by the Supreme Court of Pennsylvania is absolutely devoid of any fact to sustain the conclusion that Polk was engaged in intrastate commerce and so entitled to an award under the Workmen's Compensation Act of Pennsylvania, and hence the denial of due process of law would seem to be involved by a judgment against your petitioner which is without any basis of fact to support it.

These questions were duly raised and argued by your

petitioner before the Referee, the Compensation Board, the Court of Common Pleas and the Supreme Court of Pennsylvania.

8. That when the finding of the Compensation Referee was in part as follows:—

"Fourth.—On that date John M. Polk while employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Phila., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries.

"Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

"The defendant offered no testimony to show what work John M. Polk was performing at the time that he was injured; the defendant simply showed that the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars enroute in the course of interstate journeys, but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties

for the defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while *he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft*, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

It was error for the Supreme Court of Pennsylvania to base its affirmance of the judgment upon the finding that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" for it utterly ignores the facts established by the fourth agreed finding, that he was actually employed as a brakeman on the train of engine No. 832 when he was injured by being caught between two cars, and by the third additional finding that "the train was an interstate train and was under the control of the crew of which John M. Polk was a member," which had in charge the cars shown by the defendant to have been in the train.

9. Whether there was any burden of evidence resting on the defendant below and whether the defendant failed to meet that burden, are questions of law and neither the Compensation Referee nor the Supreme Court of Pennsylvania could change their essential character by calling them findings of fact. While it is true that the defendant called no witnesses to show what work Polk was performing at the time he was injured, it is equally true that the fact had been established by stipulation between the parties and the fourth finding of the Referee was based thereon.

10. That the question of law for determination by the Compensation Referee was as follows:—

“Is a brakeman engaged in interstate commerce while at work on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?”

This question arose upon the undisputed and agreed fact that Polk when injured was doing a brakeman's work on the train and upon the fact, found from the testimony, that the train was composed of interstate cars.

11. That the judgment below proceeds flatly upon the ground that the defendant failed to prove by testimony the work that Polk was doing when he was hurt and that it had therefore failed to meet the burden of proof resting upon it to show that he was engaged at the time in interstate commerce. Hence the conclusion is reached that the case comes within the State Compensation law, although that law can only apply if the claimant's decedent was engaged in interstate commerce.

12. That the record fails to disclose any fact to support this conclusion, which does not appear to be in concord with the decision of your Honorable Court which has repeatedly held that a finding without evidence is arbitrary and baseless and works a denial of fundamental rights.

13. That the Act of Congress, which exclusively regulates the liability of master to servant with respect to personal injury sustained in interstate railroad service, practically ceases to exist in Pennsylvania as a bar to Compensation proceedings, if the State Courts may disregard competent and conclusive evidence and treat as matter of fact a finding that a defendant railroad has failed to meet the burden of proof.

14. That it therefore follows that, unless this Court shall correct the errors of the Court below, your petitioner will be deprived of a right, privilege and immunity under

the Federal Employers' Liability Act and a right guaranteed by the due process clause of the XIV Amendment to the Federal Constitution, in this and all similar cases brought hereafter in the State of Pennsylvania.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Pennsylvania, commanding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING RAILWAY
COMPANY,

By

AGNEW T. DICE,

President.

[SEAL]

GEORGE GOWEN PARRY,

Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

AGNEW T. DICE, being duly sworn, says that he is President of Philadelphia and Reading Railway Company, the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

AGNEW T. DICE.

Sworn to and subscribed before me this 20th day of March, A. D. 1920.

[SEAL]

J. V. HARE,

Notary Public.

My Commission expires March 1, 1923.